No. 11708

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, EDWARD G. BARBER, L. MCGEE, CHRIS POULSON, FRED MAYER, DR. F. N. (DOC) DORSEY, ROBERT (BOB) BAKER, AND ANTON ANDERSON, APPELLEES

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR APPELLANT

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JURISDICTION

This is an appeal taken from an order filed and entered in the District Court for the Third Division, Territory of Alaska, on the 17th day of April, 1947. This order quashed an order to show cause previously made by the Court, dismissed the defendants and dismissed the proceedings against the defendants (R. 19–20).

The District Court had jurisdiction in this proceeding by virtue of the provisions of Chapter 103, Compiled Laws of Alaska, 1933, entitled "Actions to Avoid

Charters and to Prevent the Usurpation of Office or Franchise and to Determine the Right Thereto" and by virtue of Section 4 of the Act of June 6, 1900, c. 786, 31 Stat. 322, as amended (48 U. S. C. A. 101).

A complaint was filed in the District Court and an order to show cause was issued on the 8th day of April, 1947 (R. 2–7 and 13–14). On the 15th day of April, 1947, defendants, through their attorney, filed a motion to quash the order to show cause (R. 17). On that same date a hearing was had on said motion. An order granting the motion to quash, dismissing the defendants and dismissing the proceedings against the defendants was filed and entered by the Court on the 17th day of April, 1947 (R. 19–20).

On the 15th day of July, 1947, appellant filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit and an order allowing said appeal was duly and regularly signed and entered on the 16th day of July, 1947 (R. 21 and 24–25). The Ninth Circuit Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 128 (a) and (d) of the Judicial Code, as amended (28 U. S. C. A. 225 (a) and (d)). The appeal is governed by Section 8 (c) of the Act of February 13, 1925, as amended (28 U. S. C. A. 230), which requires that application for allowance of appeal be duly made within three months after the entry of the judgment of the District Court.

STATUTORY PROVISIONS INVOLVED

The Act of March 3, 1927, c. 363, Sections 1, 3, 44 Stat. 1392 (48 U. S. C. A. 51), provides in part as follows:

> From and after March 3, 1927, no person shall become or be an elector or voter at any general election, any special election, or any primary election, held in the Territory of Alaska for the purpose of electing or nominating any person or persons to or for the office of Delegate to the House of Representatives of the United States from the Territory of Alaska, or to or for the office of Senator or member of the house of representatives of the Alaska Territorial legislature, or to or for any other elective, Territorial, municipal, or school office in the Territory of Alaska, unless such proposed voter or elector at the time of any such election and prior to voting thereat shall be able to read in the English language the Constitution of the United States and to write in the English language: *Provided,* That the requirements of this section shall not apply to any person who is incapacitated from complying therewith by physical disability only: *And provided further,* That this section shall not apply to any citizen who has legally voted at the general election of November 4, 1924.
>
> * * * * *
>
> SEC. 3. The ability to so read and write as provided by section 51 of this title shall be

> evidenced as follows: Every person, except as otherwise provided in said section 51, desiring to vote at any such election, before being permitted to vote, shall, without the aid or assistance of any person whomsoever, legibly sign his or her own full name, and write his or her own sex and address, in the registration or poll book, * * *.

The Act of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), provides:

> All citizens of the United States, twenty-one years of age and over, who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, and who are able to read and write the English language as prescribed and provided by Section 51 of this title, and who are not barred from voting by any other provision of law, shall be qualified to vote at any of the elections mentioned in said Section 51.

Ordinance No. 51, of the City of Anchorage, entitled "An Ordinance for the Registration of the Legal Electors of the City of Anchorage, in the Territory of Alaska", approved May 17, 1924, is set forth in the record (R. 7–12). Ordinance No. 51 was amended in 1931 by Ordinance No. 80 to the extent that the registration books would remain open until 5:00 p. m. on the Saturday next prior to any municipal election instead of 4:00 p. m. on such date.

STATEMENT OF THE CASE

Pursuant to the provisions of Ordinance No. 17 (R. 28–45) of the City of Anchorage, a general municipal election was held April 1, 1947, that date being the first Tuesday of the month, for the purpose of electing a mayor, three members for a two year term to the common council, two members for a period of one year to the common council, one member to the Anchorage Public School Board for a period of one year, one member for a period of three years to said School Board, and one member to the Utilities Board for a three year term.

Prior to the election held on April 1, 1947, proper notice was published as to the date and hour of the opening and closing of the registration book and the poll book register was kept open for the registration of all legal voters residing in the City of Anchorage in compliance with the provisions of Ordinance No. 51. During the registration period provided by said Ordinance No. 51, which ended at the hour of 5:00 p. m. on Saturday, March 29, 1947, a total of 1,262 persons registered for said general municipal election.

The returns of the municipal election showed that a total of 1,738 ballots were cast. Out of this number, 653 ballots were cast by persons who had not registered in accordance with the provisions of Ordinance No. 51, and therefore the actual number of legal ballots cast at said election was 1.085.

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The tabulated results of the election were as follows:

Mayor (One Year):

Francis C. Bowden—837.
Edward V. Davis—767.
Ferdinand P. Lefort—61.
Etienne Fredericks—58.

Council (Two Years):

John E. Hoekzema—980.
Edward G. Barber—777.
L. McGee—506.
William H. (Bill) Olson—505.
C. E. Franson—451.
Olaf A. Olson—426.
Moritz Andresen—421.
Harry W. Olsen—321.
Harold Boyd—314.
Harvey Goodale—102.
Kitchel Cleaver—99.

Council (One Year):

Chris Poulsen—548.
Fred W. Mayer—528.
C. O. Risch—511.
Dr. L. J. Seeley—509.
Harry Suggitt—468.
L. W. (Tex) Noey—314.
Nicholas J. Rauch—197.
Philmore Bailey—136.

School Board (Three Years):

Dr. F. N. (Doc) Dorsey—892.
Charles L. Griffith—759.

School Board (One Year):

Robert (Bob) Baker—900.
Harold M. Reherd—639.

Utilities Board (Three Years):
Anton Anderson—1046.
George R. Jones—602.

On April 8, 1947, after the candidates receiving the majority of ballots, including both legal and illegal votes, had been issued certificates of election and had been sworn and seated, a complaint in the nature of a quo warranto proceeding was filed by plaintiff (R. 2–7), praying that defendants be ordered to appear and show by what right they claimed title to the respective offices held by them and to show cause why they should not be ousted from said offices. This information was not filed on the relation of a private person but was brought in the name of the United States of America in accordance with the provisions of Chapter 103, C. L. A. 1933 (R. 2).

On the same date an order was issued by the District Court requiring the defendants to appear on the 15th day of April, 1947, to show by what right they claimed title to the respective municipal offices held by them and to show cause why they should not be ousted from said offices (R. 13–14).

On April 15, 1947, defendants filed a motion to quash the order to show cause issued by the Court on April 8, 1947, for the reason that Ordinance No. 51, upon which said order was predicated, was unconstitutional and therefore the said order was null and void, and upon the further ground that the petition upon which said order was based did not state facts sufficient to constitute a cause of action (R. 17). A hearing on defendants' motion to quash was held on

April 15 and 16, 1947. Counsel for defendants contended that Ordinance No. 51 established an additional qualification for voters at a general municipal election in the City of Anchorage; that said ordinance was inconsistent with the provisions of the Act of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), and was therefore unconstitutional. On April 16, 1947, the court granted defendants' motion to quash and directed counsel for defendants to prepare and submit a written order in accordance with the oral decision then given. At the time the oral order of the Court was made an oral opinion was also rendered by the Court (R. 17–18).

On April 17, 1947, a formal written order was entered by the Court quashing the order to show cause issued by the Court on the 8th day of April 1947, ordering the defendants dismissed, and ordering that the proceedings against the said defendants be dismissed, the ground of said order being that Ordinance No. 51 was unconstitutional (R. 19–20). From this order appellant appeals (R. 21).

It is to be particularly noted that the proceeding in the District Court was not in the nature of an election contest. There is no provision under the laws of Alaska or ordinances of the City of Anchorage for the contest of a municipal election. The proceeding is in its nature an ouster proceeding in the form of quo warranto, and was brought under Chapter 103, C. L. A. 1933, entitled "Actions to Avoid Charters and to Prevent the Usurpation of an Office or Franchise and to Determine the Right Thereto." In view of the provisions of Chapter 103, C. L. A. 1933, the Alaska

courts have held that since the statutes of Alaska provide a plain, speedy, and adequate remedy at law for testing title to an office, equity will not assume to do so on a collateral attack (*Monahan, et al.* v. *Lynch, et al.,* 2 Alaska Reports 132, 134).

The case before this Court, therefore, presents the single question as to whether Ordinance No. 51 is inconsistent with the provisions of the Act of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), and is, for that reason, unconstitutional.

SPECIFICATIONS OF ERRORS

1. The District Court erred in holding that Ordinance No. 51 was unconstitutional.

2. The District Court erred in quashing and annulling the order to show cause issued on April 8, 1947, in ordering defendants dismissed, and in ordering the proceedings against the defendants dismissed.

ARGUMENT

Specification of error I

The District Court erred in holding that Ordinance No. 51 was unconstitutional.

Specification of error II

The District Court erred in quashing and annulling the order to show cause issued on April 8, 1947, in ordering the defendants dismissed, and in ordering the proceedings against the defendants dismissed.

The argument on these two specifications of error is presented together inasmuch as they both involve the same point, i. e., the constitutionality of Ordinance No. 51.

In McQuillin, Municipal Corporations, 2d Ed., Vol. 2, Section 427, p. 11, et seq., we find the following statement:

> If the constitution prescribes the qualifications of electors, state and local, such qualifications of course cannot be diminished, enlarged or in any way changed by statute, charter or ordinance, but in the absence of constitutional restriction, federal or state, the legislature's power respecting elections is unlimited, and it may prescribe or change the qualifications of municipal voters. Where the qualifications of electors or persons authorized to vote at municipal elections are prescribed by the state constitution and laws, such provisions are controlling in the conduct of municipal and other elections unless the particular state constitution vests such power in the local electors, and the local corporation cannot by charter, ordinance or otherwise depart from the method laid down. But if the provisions do not conflict with the general law of the state the municipal corporation is frequently permitted to prescribe by charter or ordinance the qualifications of voters voting at municipal elections, and *to provide for their registration.* [Italics supplied.]
>
> *Republican Town Committee, Narragansett* v. *Knowles,* 198 Atlantic 780.
>
> *McMahon* v. *Mayor, etc., of Savannah,* 66 Ga. 217, 42 Am. Rep. 275.

In *McMahon* v. *Mayor, etc., of Savannah, supra,* the constitution prescribed the qualifications of voters and also provided that the general assembly might enact

laws for the registration of all voters. The Act challenged in that case, among other things, provided that the City Clerk of the City of Savannah should open a list for the registration of voters, that such list should be open from the 1st Monday in July until the 1st Monday in December, till 2:00 p. m., that upon being registered a certificate was to be issued to the voter and upon production of the certificate of registration at the polls the voter was entitled to vote, but not otherwise. It was contended that the law was manifestly inconsistent with the Constitution of Georgia, that it prescribed qualifications for electors not authorized by the constitution, and that it would disfranchise voters under the constitution and deprive them of their right to vote. The lower court in sustaining the validity of the statute stated:

> On the hearing upon the rule to show cause why an injunction should not issue this day had, it being the opinion of the court that the city registration law is valid and constitutional and still of force, upon this ground alone, and without passing upon the affidavits submitted, it is considered and ordered by the court that the injunction be, and the same is hereby denied and refused.

On appeal the judgment of the court below was affirmed.

Section 9 of the Organic Act of Alaska (Act of August 24, 1912, c. 387, Sec. 9, 37 Stat. 512, 514–515, 48 U. S. C. A. 77) provides in part as follows:

> The legislative power of the Territory of Alaska shall extend to all rightful subjects of

> legislation not inconsistent with the Constitution and laws of the United States, * * *.

Subsection 3 of Section 4 of the Act of April 28, 1904, c. 1788, 33 Stat. 531–537, pertaining to cities of the first class in the Territory of Alaska, provides in part as follows:

> SEC. 4. That the said common council shall have and exercise the following powers:
>
> * * * * *
>
> *Third:* To make suitable provisions for municipal and other elections, and to appoint three judges and two clerks of election for each polling place in the town.

This provision is embodied in Subsection three of Section 627 of the Compiled Laws of Alaska, 1913. It appears in the Compiled Laws of Alaska, 1933, as Section 2383.

Congress, by this provision, has expressly granted to the common council of the City of Anchorage the power to make suitable provisions for municipal elections. This must be construed as granting to the council the right to provide for municipal elections, and as an incident to such right the power to regulate and control such elections. While it may seem at first glance that this is an effort to stretch the power granted by Congress, it cannot logically be contended that since Congress granted the power to make suitable provisions for municipal elections to the council, stopped there and did not itself provide the necessary rules and regulations to govern such municipal elections, it did not intend for the common council to prescribe such rules and regulations.

The Act of Congress, March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), prescribes the qualifications for electors in the Territory of Alaska. It goes no further. It does not prohibit registration either expressly or by implication. No mention is made regarding registration or the procedure governing the conduct of elections at which such electors are to vote. The failure of Congress to supply these necessary details and to establish such procedure indicates that it was the intention of Congress that such be done by the Territorial Legislature or municipal councils. This position finds support in *In re Opinion of Justices,* 247 Mass. 583, 143 N. E. 142, in which a communication from the Justices of the Supreme Judicial Court of the State of Massachusetts relative to the meaning and scope of the term "legal voters," as used in certain amendments of the Constitution relating to the taking of the decennial census, was addressed to the Senate and House of Representatives. This communication bore the signature of the seven Justices of the Supreme Judicial Court and stated in part,

> The Constitution has made no express provision for the ascertainment of those who possess the qualifications prerequisite for voting. Manifestly such an ascertainment must be made before the franchise can be exercised in an orderly and expeditious fashion. There must be an examination of the demands of persons claiming to possess the constitutional qualifications to vote, a sifting out of those who in truth possess those qualifications and a separa-

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> tion of those thus qualified from others who lack such qualifications. The names of those thus found to be qualified must, as a practical matter, be listed and arranged so that elections may be conducted with such speed as to enable all the large numbers of voters to exercise their franchise in a reasonable time and under proper conditions. It is within the jurisdiction of the Legislature to make suitable and wholesome laws upon this subject. That jurisdiction has been exercised continuously from the adoption of the Constitution until the present. Elaborate provisions to that end are found in the General Laws.

The position advanced by appellant is strengthened by the fact that the Legislature for the Territory of Alaska, in the year 1929, two years after the enactment of the Act of Congress of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), enacted a bill relating to the incorporation of cities of the second class. This law, Chapter 99, Session Laws of Alaska, 1929, Section 5, sub-section Second (Section 2485, sub-section Second, C. L. A. 1933), provides as follows:

> The trustees shall have the following powers:
>
> * * * * *
>
> *Second:* To make rules for all municipal elections in said city of the second class.

Here the Territorial legislature enacted a law specifically giving the trustees of a city of the second class the right to make rules governing the elections in such cities. Certainly it cannot be successfully contended that the trustees of a city of the second

class are possessed of a different and greater power than that of a common council in a city of the first class.

It seems apparent that Chapter 99, S. L. A. 1929, section 5, subsection 2, is not inconsistent with the provisions of Section 57, Title 48, U. S. C. A., and, consequently, is not void by virtue of Section 9 of the 1912 Organic Act of Alaska. Otherwise, it may be assumed that Congress would have taken action to nullify the Territorial statute. Section 20 of the 1912 Organic Act provides that "All laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect" (48 U. S. C. A. 90). It follows that Chapter 99, S. L. A. 1929, must have been submitted to Congress. The fact that Congress has taken no action to disapprove the statute is "significant," (*Christianson* v. *King County,* 239 U. S. 356, 366) and compels the conclusion that the law has received the implied sanction of Congress, having been upon the statute book for more than eighteen years.

If Congress has sanctioned the grant of power to the trustees of a city of the second class to "make rules for all municipal elections" it would not seem that it could logically be contended that it intended that this power be denied to common councils of a city of the first class. The more logical conclusion would be that the power "to make suitable provisions for municipal and other elections" was intended by Congress to grant to the common councils in a city of the

first class the power not only to provide for elections, but also the power to make rules and regulations governing the conduct of such elections.

There is nothing contained in Section 7 of the Act of March 3, 1927, c. 363, 44 Stat. 1392, 48 U. S. C. A. 57, nor in any other section of the Act, that would tend to indicate that Congress intended to prohibit registration. On the contrary, it would seem that an argument may be made that Section 3 of the Act explicitly recognizes that registration might be required, for it is there provided:

> Every person, except as otherwise provided in section 1 of this Act, desiring to vote at any such election, before being permitted to vote, shall, without the aid or assistance of any person whomsoever, legibly sign his or her own full name, and write his or her own sex and address, in the REGISTRATION or poll book * * *. [Italics supplied.]

In addition, the Act shows on its face, and the legislative history is in accord, that it was passed primarily for the purpose of prescribing a literacy test for voters in Alaska.

What legislative history there is concerning the Act indicates that Congress did not intend to prohibit registration.

Senate Report 1645, 69th Cong., 2d Sess., on the bill, H. R. 9211, states, among other things, in quoting from the House Report:

> The bill provides that every person, before being allowed to vote, shall, without the aid or assistance of any person whomever, legibly

> sign his or her full name, and write his or her sex or address in the registration or poll book.

In the House, an amendement to the Bill was proposed as follows (68 Cong. Rec. 3977):

> And provided further, that this act shall not apply to any citizen who has legally voted at the general election of November 4, 1924.

In the debate on this proposed amendment it was substantially recognized that voters in Alaska might be required to register. The following discussion resulted from a query (68 Cong. Rec. 3977) as to what would happen regarding those persons who did not vote in the 1924 election, but had previously voted, in view of the fact that election returns were destroyed each year (68 Cong. Rec. 3978):

> Mr. VAILE. Is not it the usual rule that when a man has previously been registered fails to vote at this present election he is off the registration list and has to register again?
>
> Mr. STRONG, of Kansas. In many of our election laws that is the fact.
>
> Mr. VAILE. And is not the gentleman following the usual practice by this bill?
>
> Mr. STRONG, of Kansas. Yes.

The amendment was agreed to and the bill was passed (68 Cong. Rec. 3978).

The only discussion in the Senate regarding the bill is reported as follows (68 Cong. Rec. 5221):

> The bill (H. R. 9211) to prescribe certain of the qualifications of voters in the Territory of Alaska, and for other purposes, was announced as next in order.

Mr. LaFollette. Let the bill be read.

The Presiding Officer. The Clerk will report the bill.

Several Senators. Over!

Mr. Dill. Mr. President, I wish Senators would withhold their objection for a moment. This bill simply requires the voters of Alaska to have the same requirements that we have in the State of Washington.

Mr. LaFollette. I withdraw my objection.

Mr. King. I would like to ask the Senator what right we have to prescribe the qualifications of the voters of Alaska? They have a territorial legislature.

Mr. Dill. The territorial legislature, I think, is satisfied with this regulation. I hope the Senator will not object to the consideration of the bill.

Mr. King. I think it is paternalism, wholly unjustified, but I will not object.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

It would seem, therefore, that the Act of March 3, 1927, in no way prohibits the enactment by an Alaskan municipality of an ordinance requiring registration of voters.

While it may be conceded that the legislature may not abridge the right of an elector to vote by requiring from him qualifications additional to those required by the Constitution, it is well settled that registration laws, whether enacted under express or implied constitutional provision, do not, when reasonable, require of the voter additional qualifications, so

as to render them unconstitutional or beyond the power of the legislature to enact. Such laws may generally be sustained as a regulation of the right to vote, if they afford to the voter reasonable opportunity to register and vote. Such statutes are said merely to provide a means of furnishing proof of the existence of the qualifications required by the Constitution. It is not necessary, in order to sustain the power of the legislature to enact registration laws, that there should be a specific or express authorization in the Constitution to that effect. Even in the absence of such constitutional authorization (and *a fortiori* in its presence), the power of the legislature to enact such laws is generally recognized. The theory is that the Constitution in providing for the voters qualifications contemplates the enactment of laws to determine the existence of those qualifications.

U. S. v. *Quinn,* 8 Blatchf. 48, Fed. Cases No. 16, 110.

McMahon v. *Savannah,* 66 Ga. 217, 42 Am. Rep. 65.

Blue v. *State ex rel. Brown,* 206 Ind. 98, 188 N. E. 583.

State v. *Butts,* 39 Kan. 537, 2 Pac. 618.

Perkins v. *Lucas,* 197 Ky. 1, 246 S. W. 150.

Capen v. *Foster,* 12 Pick. (Mass.) 485, 23 Am. Dec. 682.

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State ex rel. Pine v. *Board of Education,* 158 Minn. 459, 197 N. W. 964.

State ex rel. Meyer v. *Woodbury,* 321 Mo. 275, 10 S. W. 2d. 524.

State ex rel. Carroll v. *Superior Court,* 113 Wash. 54, 193 Pac. 226.

State ex rel. Boyle v. *Board of Examiners,* 21 Nev. 67, 24 Pac. 614.

State v. *Weaver,* 122 Tenn. 198, 122 S. W. 465.

Page v. *Allen,* 58 Pa. St. 338, 98 Am. Dec. 272.

Fitzmaurice v. *Willis,* 20 N. D. 372, 127 N. W. 95.

People ex rel. Grinnell v. *Hoffman,* 116 Ill. 587, 5 N. E. 596.

The qualifications of voters in the Territory of Alaska are established by an Act of Congress rather than by a state constitution. However, there is nothing contained in the Act of March 3, 1927, which would prohibit the Territorial legislature, or the common council of the City of Anchorage, from enacting a registration statute, and it is apparent that the common council had the power to enact an ordinance establishing a system of registration of voters for the City of Anchorage. When we consider the fact that Congress specifically granted the power to common councils of the cities of the first class "to make suitable provisions for municipal and other elections * * *," this conclusion is inescapable.

Granted that the common council of the City of Anchorage has the power to enact a registration ordinance, we are then confronted with the question as to whether an ordinance, such as Ordinance No. 51 of the City of Anchorage, requiring, as it does, registration prior to the day of the election, is a regulatory measure or whether it is so unreasonable and inconsistent

with the Act of March 3, 1927, that it is null and void. The provisions of the Act of March 3, 1927, require that electors shall have resided continuously for thirty days next preceding the election in the precinct in which they vote. Ordinance No. 51 (R. 7–12) provides that the registration books shall open at least sixty days prior to the general municipal election and that they shall be closed on Saturday at 5:00 p. m. o'clock next prior to any municipal election. Ordinance No. 17 (R. 28–45) provides that there shall be a general municipal election held in the City of Anchorage annually on the first Tuesday of April of each year. It will, therefore, be seen that, under the provisions of Ordinance No. 51, the registration books are open and available to qualified electors for a period of time thirty days greater in length than the period of residence required under the provisions of Section 7 of the Act of March 3, 1927. Also, that the registration book is closed for only two days, one of which is Sunday, immediately prior to the general municipal election.

It is recognized that the cases of *White* v. *Multnomah County,* 13 Or. 317, 10 Pac. 484, 57 Am. Rep. 20, *Dells* v. *Kennedy,* 49 Wis. 555, 6 N. W. 246, and *Daggett* v. *Hudson,* 43 Ohio St. 548, 3 N. E. 538, represent a minority view holding that statutes requiring registration prior to the day of election are to be considered unconstitutional and void.

In the case of *White* v. *Multnomah County, supra,* the Supreme Court of the State of Oregon, in an opinion by a divided court, held that under the Oregon constitution, which prescribes the qualification of vot-

ers, and makes no provision for registration laws, any statute which requires previous registration as a prerequisite to the right to vote is *ipso facto* void.

It is submitted that the dissenting opinion in the *White* case is the opinion in harmony with the weight of authority and is more consistent with logic and good reasoning than the opinion of Chief Justice Waldo, in which Justice Lord concurred. In the dissenting opinion Justice Thayer states:

> It is contended that the regulation is not reasonable because the right to register is not continued until the day of the election. I suppose the legislature deemed the three-days session of the board as sufficiently long to enable the voters in the precinct to register, and that the provision for those who were sick, or absent therefrom, as ample time to enable them to do so, and, conceding that the legislature has the right to require such registration prior to the time of the election, it has the right to judge as to what would be a reasonable time for the purpose. Whether it has judged correctly or not will be ascertained by the practical working of the law. A person would naturally suppose that the voters of a precinct could all register in three days as well as vote in one. They certainly would do so if they attached that importance to the elective franchise that good citizens should. This law will doubtless subject many citizens to considerable inconvenience, but they had better submit to that than have their voice stifled by the admission to the privilege of a horde of lawless mercenaries and repeaters. The citizens duty is not fully discharged when

> he has deposited his ballot; he should attend to it that no spurious or illegal vote counteracting the effect of his own be cast. Elections are but a travesty where every vagabond may vote without restraint. It is no privilege to vote when an irresponsible wretch can be imported to vote, or hired to repeat his vote. Elections may as well be turned over to the hoodlum element of the community to manage and control, if citizens are unwilling and refuse to submit to the inconvenience a registry law imposes.
>
> * * * * *
>
> I am of the opinion that the registry act in question is not unconstitutional; that the legislature has power to provide the mode it has in order to ascertain who are qualified electors, under the constitution; and that the provisions of the act are not so unreasonable as necessarily to deprive voters from the exercise of the right of suffrage; * * *

In *State* v. *Christ,* 179 Pac. 629, 634, the Supreme Court of the State of New Mexico, in an opinion by Chief Justice Parker, in which District Judges Leahy and Hickey concurred, the following comment was made regarding the *White* case:

> *White* v. *Multnomah County,* 13 Or. 317, 10 Pac. 484, 57 Am. Rep. 20, is cited. This case was one where the Oregon Court under the constitutional provision which prescribed in detail the qualifications of electors, and provided that all such electors should be entitled to vote at all elections authorized by law, held that a statute which required previous registry as a pre-requisite to the right to vote was ipso facto

> void. This doctrine is pronounced to be unsound by Judge Cooley in Cooley's Con. Lim. p. 906, and Mr. McCrary in McCrary on Elections, Sections 130, 131, 132, shows that the holding in the Oregon case is unsound *both upon reason and weight of authority.* * * * [Italics supplied.]

In *City of Portland* v. *Coffey,* 67 Or. 507, 135 Pac. 358, the Supreme Court of the State of Oregon stated:

> Section 2 of article 2 of the Constitution of this state, as amended November 5, 1912 (Laws Or. 1913, p. 7), prescribes the qualifications of electors. Though the legal right of a citizen is thus recognized, it is conceded that the legislative assembly may by reasonable enactment protect the right so as to preclude disqualified persons from voting, *and that any registration law which tends to purify the ballot and to prevent repeating ought to be upheld in the interest of good government.* When, however, such legislation trenches upon the authority conferred by the Organic Act upon legal voters so as to prevent them from exercising the right of suffrage, the courts must, when properly appealed to, set aside such enactments as are violative of the provisions of the fundamental law. [Italics supplied.]

In McCrary on Elections, Fourth Edition, Section 132, pp. 99, 100, in discussing the constitutionality of acts requiring registration prior to the day of election, we find the following statement:

> The opposite view has, however, been expressed by the Supreme Court of Wisconsin in *Dell* v. *Kennedy,* by the Supreme Court of Ohio

in *Daggett* v. *Hudson,* and by the Supreme Court of Oregon in *White* v. *County of Multnomah.* In the first named case there was a strong dissenting opinion by Taylor, J., and in the last by Thayer, J. In the case of *Daggett* v. *Hudson* much stress is laid upon the fact that by the Constitutions of many States registration laws are either authorized or required to be enacted. The inference is drawn that in those States where the Constitutions are silent upon the subject the power to enact such a statute as we are now considering does not exist. But it is to be observed that the Constitution of no State defines the character of the registration law which may be enacted, or provides that registration prior to the day of election may or not be required. It is believed that no case goes so far as to deny the power of the Legislature of a State to pass a registration act, when the Constitution is silent upon the subject. This being so, the question we are considering is not affected by the presence or absence of a constitutional provision authorizing the Legislature to pass such an act. The power exists in either case, and in either case the question must be the same, viz.: whether the act when passed merely regulates the exercise of the right to vote, or goes further and impairs it.

In construing the provisions of Ordinance No. 51, such construction must, of course, be made by reference to established judicial precedent. It is recognized by the weight of authority that statutes requiring registration prior to the day of the election are constitutional, that they do not add an additional qualifica-

tion but are a method of providing a system requiring electors to furnish proof of the existence of the qualifications prescribed by the constitution and merely regulate the right of suffrage.

The power of the legislature to provide for the registration of voters under, or in the absence of, express constitutional authority is recognized by the great weight of authority as is reflected in the following cases.

In *Capen* v. *Foster,* 12 Pick. (Mass.) 485, 23 Am. Dec. 682, the plaintiff possessed the qualifications prescribed by the constitution but was refused the right to vote because his name was not on the list of qualified voters as required. The constitution did not require that plaintiff's name be borne on any list. The question submitted was whether a statute requiring the plaintiff's name to be listed was constitutional. The plaintiff was nonsuited, the Court stating:

> The Constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must at some time be had by those who are to decide on them. The time and labor necessary to complete these investigations must increase in proportion to the increased number of voters; and indeed in a still greater ratio in populous commercial and manufacturing towns, in which the inhabitants are frequently changing, and where of necessity many of the qualified voters are strangers to the selectmen.
>
> If, then, the Constitution has made no provisions in regard to the time, place, and manner

in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent to the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and procure the exercise of that right.

And this court is of opinion, that the provision in the general law regulating elections, and that in the act incorporating the city, which requires that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, that their names shall be entered upon an alphabetical register or list of voters, is highly reasonable and useful, calculated to promote peace, order, and celerity in the conduct of elections, and as such, to facilitate and secure this most precious right to those who are by the constitution entitled to enjoy it; that it can not be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting, which it was competent to the legislature to make, and therefore that these legal enactments, not being repugnant to the constitution, are valid and binding laws, to which both voters and presiding officers at elections are authorized and bound to conform.

In *State* v. *Butts,* 31 Kan. 537, 2 Pac. 618, the constitutionality of the registration act of the State of Kansas was challenged. The Constitution of the

State of Kansas directed the legislature of that State to enact suitable registration laws. The provisions of the Kansas act are practically indentical with those of Ordinance No. 51 of the City of Anchorage, except that the Kansas act provided that the poll books were to be open at all times during the year for registration except during the ten days prior to any election. In reversing the case and thereby holding the Kansas registration act to be constitutional, the Court stated:

> In conclusion, we think it may be affirmed that, under the requirements of our constitution, it is the duty of the legislature to provide for a registration of voters; that it may provide that such registration be completed prior to the day of election, provided that ample facilities and time for registering are prescribed; and that it may also provide that one not registered shall not be allowed to vote.

In *People ex rel. Grinnell* v. *Hoffman,* 116 Ill. 587, 5 N. E. 596, the Illinois constitution of 1848 made no provision for any action of the legislature in reference to the registration of voters. An Illinois statute passed in 1888 provided for registry on the third and fourth Tuesdays before the election day, and prohibited registration between the said third Tuesday and election day, with the consequence that the vote of any person whose name did not appear upon said registry as a qualified voter three weeks before the election day was not to be received. It was contended that the legislature had no authority to require that the registry be closed three weeks before the election, and to prohibit a man from voting because he had not

established his qualifications three weeks before the day for voting. In repudiating this contention, the court stated:

> If it be admitted that the legislature can require a voter to establish his qualifications before election, it is difficult to see why, upon principle, or as a question of power, it cannot require such proof to be made as well three weeks before the day for voting, as ten days or five days, or even one day, prior thereto. The real question involved in the objection is whether any man can be prevented from voting who proves, or offers to prove on the day on which he seeks to cast his ballot, that he is a legal voter. If cases can be supposed where the three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of a registry law unconstitutional. For it would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time and on the same day. If the legislature has the power to direct the registry to be completed before election day, and if, in its wisdom and under a sense of its responsibility to the people, it has said that three weeks before election is a reasonable date for the completion of the registry, shall this court substitute its judgment for that of the lawmaking power, and say that a shorter time would have been more reasonable?

The court further said:

> If closing the registry three weeks before election may deprive a few persons, becoming qualified during that period, of the privilege of casting their ballots, keeping it open until a late date may admit to the polls hundreds of persons who should never have been allowed to vote. When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed. * * * Where the lawmaking department of the government, in the exercise of a discretion, not prohibited by the Constitution, has declared that a certain period of time is needed for a specified investigation, it is not the duty of this court to declare that such period is unreasonably long.

In *State ex rel. Pine* v. *Board of Education,* 158 Minn. 459, 197 N. W. 964, it was contended that the registration act was unconstitutional in that it unreasonably restricted the right to vote. Section 3 of the 1923 Act provided:

> From and after the first (day) of January, 1924, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this act.

Section 8 provided:

> The commissioner of registration shall have 15 full days between the last day of registration and election day, to perfect his election registers and for that purpose 15 days before any election day shall be days upon which voters may not register.

The court stated:

> The constitution provides that a citizen of the United States, who has been such for three months, and "Who has resided in this state six months next preceding any election, shall be entitled to vote at such election in the election district in which he shall at the time have been for thirty days a resident, for all officers that now are, or hereafter may be, elective by the people." Article 7, Section 1.
>
> It is the contention of the board that the Act of 1923 in disqualifying qualified voters under the Constitution from voting in the event that they do not register at least 15 days before the election is an unreasonable limitation and is unconstitutional. That the Legislature may provide a system of registration, although the Constitution authorizes none, is not in doubt. It must be such as not unreasonably to interfere with the right of a qualified voter to vote. Cases differ as to what limitations may be properly imposed through the requirement of registration. Many of them are collected in 20 C. J. 81; 9 R. C. L. 1036, Sections 52–55, 25 L. R. A. 480; Paine on Elections, Section 340; McCrary on Elections, Sections 126–138. In our judgment the limitation placed upon the constitutionally qualified citizen by the registration act of 1923 is reasonable and the statute constitutional.

In *Fitzmaurice* v. *Willis,* 20 N. D. 372, 127 N. W. 95, the Court in its opinion stated:

> The Constitution permits the legislature to prescribe regulations for the conduct of elec-

> tions. Section 129. Under such provision, *or even without it,* the legislature may prescribe reasonable regulations to prevent fraud, preserve order, and insure a fair election, and to that end may prescribe the method by which the qualifications of those offering their votes as electors may be proved, and prohibiting them from voting or their votes from being received if offered, unless such proof is made. * * * [Italics supplied.]

In *Blue* v. *State ex rel. Brown,* 206 Ind. 98, 188 N. E. 583, the Court quoted from Cooley on Constitutional Limitations (8th Ed.), vol. 2, pp. 1368, 1369 and 1370, as follows:

> In some of the States it has also been regarded as important that lists of voters should be prepared before the day of election, in which should be registered the name of every person qualified to vote. Under such a regulation, the officers whose duty it is to administer the election laws are enabled to proceed with more deliberation in the discharge of their duties, and to avoid the haste and confusion that must attend the determination upon election day of the various and sometimes difficult questions concerning the right of individuals to exercise this important franchise. Electors also, by means of this registry, are notified in advance what persons claim the right to vote, and are enabled to make the necessary examination to determine whether the claim is well founded, and to exercise the right of challenge if satisfied any person registered is unqualified. When the Constitution has established no such rule, and is entirely silent on the subject, it has sometimes

> been claimed that the statute requiring voters to be registered before the day of election, and excluding from the right all whose names do not appear upon the list, was unconstitutional and void as adding another test to the qualifications of electors which the Constitution has prescribed, and as having the effect, where electors are not registered, to exclude from voting persons who have an absolute right to that franchise by the fundamental law. This position, however, has not been generally accepted as sound by the courts. This provision for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised. * * *

In *Weil* v. *Calhoun,* Circuit Court, Northern District Georgia, 25 Fed. 865, in which objection was made that the registration act made no provision for the registry of persons who, though not entitled to vote when the books were closed, yet became so during the 10 days intervening after the closing of the books and the registration, the Court said:

> I am inclined to the opinion that the fact the registration law makes no provision for the registration of those who become competent to vote after the registration is closed, and before the election, does not vitiate the registration. If the period between the registration and election be brief, and only such as is proper for making out and putting in proper shape the registration papers, it seems to me that both reason and authority sanction such registration laws. The authorities are in conflict; but, in my judgment, sound sense and a due regard to the true interest of the state should lead a court to sus-

tain such laws as strike but a prelude and preparation for the election and a part of its machinery, even though some days intervene between the close of the registration and the actual opening of the polls. It is self-evident that some time must be taken for making out the returns of the registration and putting them in shape for use at the polls, and whether this shall be one hour, or one, two, or ten days, would seem to depend on the legislative will, and, if not grossly excessive, ought to be sustained.

In *People ex rel. Frost* v. *Wilson,* 3 Hun. (N. Y.) 437 (reversed on other grounds in 62 N. Y. 186), the Court said:

> The power of the legislature to pass a registry law whereby the name of every elector is required to be placed upon a register before the day of voting in order to entitle him to vote is not denied. It enables the legal voter to protect the ballot box against the votes of persons not legally entitled to vote; and, to be of any substantial benefit, it must be made and completed a sufficient length of time before the election to allow an investigation of the qualifications of the persons whose names are registered. To render the register of any value, there must be some forfeiture if the person who desires to vote has not proved his name to be registered, and that forfeiture should be, as it is, of his right to vote at the election for which such registry is prepared. To allow names to be entered upon the list at the time votes are offered is to defeat the purpose which the legislature had in view in framing the law, to wit, the prevention of illegal voting.

> The measures that shall be adopted to secure that end are entirely in the discretion of the legislature.

Consequently, the statute of New York providing that no vote should be received at any annual election unless the name of the person offering to vote be on the registry list, made and completed preceding the election, was held constitutional.

In *Com.* v. *McClelland,* 83 Ky. 686, it was held that a registry law which gives opportunity of registration to the voter for three days prior to the election need not, in order to be valid, make provision for the examination on the day of election of the qualification of voters who could not avail themselves thereof. The court said:

> It might, perhaps, be proper to make provision for the registration at some other time before the day of election, of those unavoidably absent during the three days; but we do not perceive how the constitutional privilege of a qualified voter is taken from him when he is afforded a reasonable opportunity before the election to register.

In *Jaycox* v. *Varnum,* 39 Idaho 78, 226 Pac. 285, under a statute providing that, "all persons offering to vote at any election are subject to challenge, as provided by the election laws, but registration of any elector's name is prima facie evidence of his right to vote, and no person shall vote unless he is first registered," C. S. Section 565, the Court stated:

> The holding of the trial court that the vote of Mrs. Hunt was illegal was correct. She did

> not apply for registration until the day before election, which was after the registration books had been closed. No reason was given for her lack of diligence. In fact, she made no effort to register at all, but was sought out by election officers and procured to subscribe the elector's oath and her name was enrolled by the registrar after the statutory period for registration had closed.

In its opinion the Court quoted *Earl* v. *Lewis,* 28 Utah 127, 77 Pac. 238, as follows:

> While the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the Legislature or the malfeasance or misfeasance of a ministerial officer, the voter himself may waive the exercise of the right, and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, or neglects to properly apply for registration.

In *City of Pond Creek* v. *Haskell,* 21 Okla. 711, 97 Pac. 338, and *Incorporated Town of Lehigh* v. *Thomas,* 21 Okla. 901, 97 Pac. 362, it was held that a statute requiring that all voters of all cities of the first class to register as a prerequisite condition to the exercise of their right of suffrage, in view of Const. art. 3, sec. 7, authorizing the Legislature, when necessary, to provide for the registration of electors throughout the state, or in any incorporated city or town, is not violative of the fourteenth amendment of the Federal Constitution, nor of Const. Okl. art. 3, sec. 7, providing that all elections shall be free and equal.

In *State ex rel. Hyland* v. *Peter,* 21 Wash. 243, 57 Pac. 814, under statutes requiring persons to be registered prior to the day of election, and further providing that persons not registered were not entitled to vote, it was held that it was no excuse for failure to register, that the voter was a member of the City Fire Department and was prevented from registering by his duties as a fireman, that he was not entitled to vote.

In *Turner* v. *Fogg,* 39 Nev. 406, 159 Pac. 56, it was contended that an act of the legislature of Nevada was void because of a provision which limited the right to vote at the primary election only to electors who had duly entered upon the register a designation of their party affiliation. The court held that the requirement for registration of party affiliation as a prerequisite of the right to vote was a reasonable regulation and a valid exercise of the legislative power.

In *McMillan* v. *Siemon,* District Court Appeal, Fourth District, California, 98 Pac. 2d, 790, 794, it is stated:

> The constitution does not prohibit the enactment of laws, either by the legislature or by the people by means of the initiative or referendum, which require electors to register as a condition precedent to exercising their privilege of voting and provide for reasonable methods of registration. "Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only ascertaining who are qualified electors, and to prevent persons who are not such electors from voting." *Bergevin* v. *Curtz,* 127 Cal.

88, 59 Pac. 312. Such laws, therefore, do not contravene the constitutional provisions relating to the qualifications of electors. *People ex rel Martin* v. *Worswick,* 142 Cal. 71; 75 Pac. 663.

A statute must, if possible, be so construed as to be constitutional. The application of this principle is reflected in the case of *Oregon-Washington R. & Nav. Co.* v. *U. S.* (D. Ore.) 47 F. 2d 250, 256, wherein it was stated, "If a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, it is the duty of the courts to adopt the latter." The Supreme Court of the United States in affirming the judgment, 288 U. S. 14, 40, stated, "Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In *Edwards* v. *United States,* 91 F. 2d 767, 785, this Court applied the principle stated in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, "the cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." In the *Edwards* case this Court also quoted from Mr. Justice Van Devanter's opinion in *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78, as follows, " * * *

if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

In *Territory* v. *Northern Commercial Co.,* 6 Alaska Reports 754, it was held that "It may be premised that courts will not pronounce an act of the Legislature void or unconstitutional, unless such unconstitutionality appears beyond a reasonable doubt."

In re Boswell, CCA 9, 96 F. 2d 239, 241, applied the principle declared in *Ogden* v. *Saunders,* 12 Wheat. 213, 270, 6 L. Ed. 606, that: "It is but a decent respect due to the wisdom, the integrity and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

In applying the foregoing principles of statutory construction to the present case it would seem that this court would be bound by the weight of authority holding that registration acts requiring registration prior to the day of election are valid, if reasonable in their terms, and that the only conclusion which could be reached by this court is that Ordinance No. 51 adopted and approved by the Common Council of the City of Anchorage on the 17th day of September 1924, is not inconsistent with the Constitution of the United States or any act of Congress and is, therefore, valid.

Counsel for appellees may concede that acts requiring registration prior to the day of election are constitutional where there is a State constitution providing for registration, or even where the State constitution is silent, but may maintain that where the qualifications of voters are established by an act of Congress

rather than a State Constitution, as is true in the instant case, the Territorial legislature or a municipal council does not have the power to enact such laws.

It would seem that such a contention is without basis either in logic or in precedent. As previously set forth, Section 9 of the 1912 Organic Act of Alaska (Act of August 24, 1912, c. 387, Sec. 9, 37 Stat. 512, 514, 515, 48 U. S. C. A. Sec. 77) provides in part as follows:

> The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; * * *

There is nothing in Ordinance No. 51 that is in any manner inconsistent with the Constitution or any law of the United States. The fact that Congress has enacted a law establishing the qualifications of voters does not prohibit the Territorial legislature or a municipality from legislating on the same subject unless such legislation is inconsistent with "the Constitution and laws of the United States."

The organic Act of 1912, cited supra, also provides:

> nor shall the legislature or any municipality interfere with or attempt in any wise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States Marshal or any of his deputies, or any police officer, and destroyed; * * * and all acts passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section * * * shall be null and void * * *.

In *Patterson et al.* v. *Jones,* C. C. A. 9, 143 F. 2d 531, in an appeal from the District Court for the Third Division of the Territory of Alaska, the defendant was charged and convicted of a violation of Section 3, Chapter 56 of the Session Laws of Alaska, 1919. He was sentenced to six months in the Federal Jail. Defendant filed a petition for a writ of habeas corpus alleging that the judgment was based upon his conviction for the crime of maintaining a gambling place contrary to said Section 3, Chapter 56, S. L. A. 1919; he further alleged that that statute was void as having been passed by the legislature of the Territory of Alaska in violation of Section 9 of the 1912 Organic Act of Alaska. A writ of habeas corpus issued and appellants filed a return thereto which simply recited that appellee had been confined under the judgment of the United States Commissioner's Court from October 15 to October 17, 1942, having on the latter date been released on bail pending a hearing on the writ of habeas corpus. Appellee filed a demurrer to the return, and a hearing thereon was held October 27, 1942.

Section 152 of the Criminal Code of the Territory of Alaska (Act of March 3, 1899, Title I, c. 429, 30 Stat. 1253, 1275, (Sec. 4892, Compiled Laws of Alaska, 1933)) defines the crime of gambling and provides: "And upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in jail until such fine and costs are paid; provided that such person so convicted shall be imprisoned one day for every two dollars of such fine

and costs; and provided further, that such imprisonment shall not exceed one year."

Section 3, Chapter 56, of the Session Laws of Alaska, 1919, (Sec. 4985, Compiled Laws of Alaska, 1933), defines the crime of maintaining a gambling place and provides: "And upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the federal jail for not less than thirty days nor more than six months, or by both such fine and imprisonment, for each offense."

The District Court subsequently sustained the demurrer and filed findings of fact and conclusions of law in which it concludes that the portion of Section 4985 of the Compiled Laws of Alaska, 1933 (Sec. 3, c. 56, S. L. A. 1919), providing for punishment by imprisonment for the offense defined therein, is void as far as the judgment in this case is concerned as being in conflict with the provisions of Section 9 of the Organic Act of Alaska.

In reversing the decision of the District Court, this Court held: "The congressional stricture upon the legislative bodies of the Territory of Alaska and its municipalities that they should not 'interfere with or attempt in any wise to limit the Acts of Congress to prevent and punish gambling * * *,' does not bar such bodies from legislating in regard to the subject matter of gambling. It does, however, bar the territorial legislature from enacting laws that would in any manner run counter to the spirit and effect of the congressional enactments against the evil of gambling.

Although the two acts are not exactly parallel, from a practical standpoint they run in the same direction, and the charge here in all probability could have been laid under either act."

If the Territorial legislature had the power to legislate to the extent that it did in Section 3, Chapter 56, S. L. A. 1919, on the subject of gambling, notwithstanding the specific prohibition contained in the Organic Act of Alaska, certainly the power of such body or of a municipal council to legislate where the Act of Congress does not contain such a prohibition, but is merely silent, cannot be denied.

In the oral decision granting the Motion to Quash (R. 17–18), the District Judge stated, "and also I am impressed by the fact that there has been no repeal of Ordinance 17. It is still on the books and is referred to even in the later ordinance showing that the council considered it to be still on the books." It is difficult to undertsand why the learned District Judge should be impressed by this fact. Certainly there could have been no repeal of Ordinance No. 17 intended by Ordinance No. 51 when the terms of Ordinance 51 expressly referred to and incorporated a portion of such ordinance.

While references are not available to enable the writer to accurately determine the legislative history of certain statutes of the State of Washington, it appears that prior to the year 1933, an analogous situation existed under the election laws of that State. Sections 5325 to 5329 inclusive, Volume 6, Remington's Revised Statutes of Washington establish the

manner in which a voter might be challenged. It appears that those sections of the Washington Statutes had their origin in the laws of 1866.

Subsequent to the enactment of the above-mentioned sections of the Statutes, and apparently in 1890, the Washington Legislature enacted a statute which appears in Volume 6 of Remington's Revised Statutes of Washington as Section 5127. Section 5127 provides, "No person shall be entitled to vote at any election in any such city, town, or precinct who is not registered according to the provisions of this Act; * * *. The registration shall not be conclusive evidence of the right of any registered person to vote, but said person may be challenged and required to establish his right at the polls in the manner as may be required by law." The manner required by law was, at that time, the manner set forth under Sections 5325 to 5329 inclusive.

Section 5127, Washington Statutes, provides for the challenge of a registered voter in "the manner as may be required by law." The manner required by law was in existence at the the time Section 5127 was enacted. Section 5127 did not attempt to repeal Sections 5325 to 5329, but made a reference thereto. Both were in existence concurrently after Section 5127 was enacted in 1890. The enactment of Section 5127 did not render any of the sections referred to unconstitutional or void. This system of registration and challenge apparently was the system followed in the State of Washington until a new system of registration was established by legislation in 1933.

It is significant to note that in the year 1893, in the case of *State ex rel. Hyland* v. *Peter,* 21 Wash. 243, 57 Pac. 814, it was held that, under the provisions of Section 5127 requiring voters at the municipal election in the city of the third class to be registered, as a condition precedent to the right to vote, a member of the fire department of the city who was not registered, could not vote, even though he was prevented from registering because of his duties as a fireman. This case was cited with approval by the Supreme Court of the State of Oklahoma in 1936 in the case of *In Re Initiative Petition No. 142, State Question No. 205,* 55 P. 2d 455, 460.

While the second ground of defendants' Motion to Quash, namely, that the petition upon which the order to show cause was based did not state facts sufficient to constitute a cause of action, was not considered or passed upon by the District Court, it is possible that this point will be urged on appeal.

When the reasons upon which the District Judge based his order to quash are considered, it is readily recognized that it would have mattered little whether the complaint did or did not state a cause of action. Had the ruling of the District Court been based on the insufficiency of the complaint, an amended complaint could have been filed or, if the original complaint did not state a cause of action, a new complaint could have been filed in which a cause of action would have been stated. To have attempted to amend the original complaint, or to have filed a new complaint,

would have been a futile gesture in this case in view of the nature of the ruling of the District Judge.

It is appellant's contention that the complaint does contain facts sufficient to state a cause of action. However, if the case is reversed and remanded and the District Court later decides that the complaint is insufficient in its present form, this Court may rest assured that an amended complaint or, if necessary, a new complaint will be filed in which a cause of action is stated.

Appellant's contention is based upon the fact that, although by statute the writ of quo warranto has been abolished, the statutory action created is in its nature an action in quo warranto. The remedies formerly obtainable under the writ of quo warranto are now had under the statutory proceeding.

The complaint in the present action is taken from the case of *George Bartlett, et al.* v. *State of Kansas,* 13 Kans. 79. Paragraphs IX and X of the complaint (R. 5, 6) are, in substance, identical with the complaint in the *Bartlett* case. The petition in the *Bartlett* case set forth and alleged,

> that the city of Clyde, in said county and state, is a city of the third class, under and by virtue of the general laws of said state; that by the same laws there has been created and exists in said city, for the purpose of good government thereof, and for the purpose of promoting the general welfare of the inhabitants thereto, the offices of mayor, five councilmen, and police judge; that on or about the third of April, 1873, at and within said city, and within the jurisdic-

tion of this court, the said defendant Bartlett did unlawfully usurp and intrude himself into the said office of mayor of said city of Clyde, the said defendants McNulty, Ransopher, Dobbs, Campbell, and Heller did then and there unlawfully usurp and intrude themselves into the said offices of councilmen, and the said McCrea did then and there unlawfully usurp and intrude himself into the said office of police judge; and each and every of said defendants from thence hitherto have continued unlawfully to hold and exercise the said offices respectively so as aforesaid usurped by them respectively, the said offices then and there being public offices under and by virtue of the laws of said state, the said defendants from the date last aforesaid to the present time having unlawfully usurped the city government of said city; and that said defendants from the date last aforesaid to the present time, have respectively continued, and still continue, unlawfully to hold and exercise the said offices so as aforesaid respectively unlawfully intruded into by them; and the plaintiff further shows that no other person or persons is or are by law entitled to hold or exercise any of said offices. Wherefore the plaintiff demands judgment that the said defendants be ousted from said offices so by them respectively unlawfully held and occupied.

To this petition a demurrer was filed, one of the grounds being that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled and an appeal was taken from such ruling. The Supreme Court of the State of Kansas in an opinion rendered by Justice Valentine,

concurred in by all the Justices, affirmed the judgment of the court below. If the complaint in the *Bartlett* case contains facts sufficient to state a cause of action, it would seem, as contended by appellant, that the complaint in the instant case likewise contains facts sufficient to state a cause of action.

It is to be noted from the complaint in the present case (R. 2–7) that the action is brought in the name of the United States of America and not on the relation of a private party. In Bancroft's Code Pleading Practice and Remedies, vol. 4, section 4114, page 3082, it is stated:

> Under some statutes pleadings in quo warranto are the same as in ordinary civil suits, and are governed by the rules relating to pleadings in such actions. Obviously an information must state a cause of action. An individual seeking office in his own right must plead facts showing title in him. *But in proceedings by the state, it is sufficient to plead, in general terms the ultimate fact of usurpation of office, without setting forth the name of the claimant to the office.* Of course, a relator is limited to allegations set forth in his complaint. [Italics supplied.]

Chapter V, Sections 802–811, inclusive, of the California Code of Civil Procedure and the provisions of Chapter 103, Sections 3824–3837, Compiled Laws of Alaska, 1933, while not identical, both deal with actions to prevent the usurpation of an office and are, in substance, the same.

In *People ex rel Stephenson* v. *Hayden,* District Court of Appeal, First District, Division 2, California,

49 P. 2d 314, 315, cited with approval in *City of Oakland* v. *El Dorado Terminal Company,* District Court of Appeal, First District, Division 1, California, 106 P. 2d 1000, 1003, a proceeding was instituted in the nature of quo warranto by the People of the State of California, on the relation of Jesse H. Stephenson, against J. Emmet Hayden. A judgment was entered for the defendant in the Superior Court but was reversed on appeal. In the opinion by Justice Nourse, concurred in by Justices Sturtevant and Spence, the Court stated:

> The defendant was a member of the board of supervisors of the city and county of San Francisco, from which position he was retired on January 8, 1934. On February 16, 1934, the mayor of the city and county of San Francisco appointed defendant to fill a vacancy on said board, which position he now holds. Relator made application to sue in the nature of quo warranto in the name of the people to determine defendant's right to hold said office. The trial court sustained a demurrer without leave to amend as to the first count of the complaint and with leave as to the second count. A demurrer to the amended complaint was sustained with leave to amend, but plaintiff declined to amend, and judgment went to the defendant. The plaintiff appeals from the judgment.
>
> The original complaint pleaded grounds upon which the pleader claimed that the defendant was unlawfully usurping the office. When the demurrer was sustained to this complaint, these were all abandoned, and the amended complaint pleaded in general terms that defend-

> ant was "usurping, intruding into, and unlawfully holding and exercising the office of Supervisor. * * *" The rule seems to be well settled that, in a proceeding of this character prosecuted by the state, it is sufficient to plead in general terms the ultimate fact of usurpation. *People* v. *Dashaway Association,* 84 Cal. 114, 118, 24 P. 277, 12 L. R. A. 117; *People* v. *Reclamation Dist. No. 136,* 121 Cal. 522, 523, 50 P. 1068, 53 P. 1085; *People* v. *Los Angeles,* 133 Cal. 338, 341, 65 P. 749. The theory upon which the rule rests is that in quo warranto the state is not required to prove the usurpation or unlawful holding, but the entire proceeding is one in the nature of an order upon the defendant to show that he is lawfully holding and exercising the office. Though the rule of pleading has been often criticized, it has not been rejected by our Supreme Court, and it is therefore binding upon us.

It would, therefore, seem that the complaint in this action, by whatever standard it may be judged, alleges facts sufficient to state a cause of action. Certainly the ultimate fact of usurpation of office has been alleged in general terms in paragraphs IX and X.

CONCLUSION

The population of the City of Anchorage is conservatively estimated as being approximately four or five times that which it was in 1924. Also, there are several thousand transient construction workers employed in and near Anchorage. A system of registration is much more needed today than it was in 1924 when the Common Council of the City of Anchorage

considered such a system to be necessary and desirable and enacted Ordinance No. 51.

There is nothing contained in the provisions of Ordinance No. 51 of the City of Anchorage which is in any manner inconsistent with the Constitution or any law of the United States. By the provisions of that Ordinance there is established a valid, reasonable regulation designed to prevent intimidation, fraud, bribery and other corrupt practices by providing in advance of the election an authentic list of legal voters of the city. For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted.

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